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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ALICE M. SMITH

V.

CENTRA BENEFIT SERVICES, INC.

On Petition for Writ of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Fifth Circuit erred in determining that the District Court lacked jurisdiction over the Petitioner's disparate impact claim.

2. Whether, with regard to the Petitioner's disparate treatment claim, the Court of Appeals for the Fifth Circuit erred in determining that the Petitioner failed to produce evidence indicating the Respondent was motivated by discriminatory intent.

TABLE OF CONTENTS

QUESTIONS PRESENTED . . i

TABLE OF AUTHORITIES . . iii

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE . . 2
- A. Disparate Treatment Claim . 3
- B. Disparate Impact Claim . 5
- C. Proceedings Below . . 6

REASONS FOR GRANTING THE PETITION 12
- I. Petitioner's Disparate Impact Claim 13
- II. Petitioner's Disparate Treatment Claim 19

CONCLUSION 23

APPENDIX A 1

APPENDIX B 17

APPENDIX C 18

APPENDIX D 23

APPENDIX E 25

APPENDIX F 27

APPENDIX G 31

APPENDIX H 33

TABLE OF AUTHORITIES

Cases	Page(s)
Babrocky v. Jewel Food Co., 773 F.2d 857 (7th Cir. 1985) . . .	18
Bruhwiler v. University of Tennessee, 859 F.2d 419 (6th Cir. 1988) . .	4,8,22
Edwards v. United States Postal Serv., 909 F.2d 320 (8th Cir. 1990) . .	9,20,21
Equal Employment Opportunity Comm'n v. General Elec. Co., 532 F.2d 359 (4th Cir. 1976)	10,15
General Tel. Co. v. Equal Employment Opportunity Comm'n, 446 U.S. 318 (1980)	15
Gomes v. Avco Corp., 964 F.2d 1330 (2d Cir. 1992)	5
Griggs v. Duke Power Co., 401 U.S. 424 (1971)	5,15
Joslin Dry Goods Co. v. Equal Employment Opportunity Comm'n, 483 F.2d 178 (10th Cir. 1973)	11,15
Lattimore v. Polaroid Corp., 99 F.3d 456 (1st Cir. 1996) . . .	11,17
Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) .	10

Page(s)

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) . . . 7

Meser v. Meno, 130 F.3d 130 (5th Cir. 1997) 16

Price v. Southwestern Bell Tel. Co., 687 F.2d 74 (5th Cir. 1982) . . 17

Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970) . . 6

Sweeney v. Board of Trustees of Keene State College, 604 F.2d 106 (1st Cir. 1979) 4,9,22

Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir. 1976) 15

Other Authorities

28 U.S.C. § 1254 (1994) . . 2

42 U.S.C. § 2000e(1)-(17) (1994) . 18

29 C.F.R. pt. 1607 § 5(d) (1995) . 14

IN THE SUPREME COURT OF THE UNITED STATES

ALICE M. SMITH, *Petitioner*

v.

CENTRA BENEFIT SERVICES, INC., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Alice M. Smith, Petitioner, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinions of the District Court (App., *infra*, 1-16) and the Court of Appeals (App., *infra*, 18-22) are unreported.

JURISDICTION

The Court of Appeals entered its judgment on March 25, 1999 (App., *infra,* 18). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1994).

STATEMENT OF THE CASE

On March 22, 1996, the Petitioner, Alice M. Smith, filed a Charge of Discrimination with the United States Equal Employment Opportunity Commission alleging that the Respondent, Centra Benefit Services, Inc., had engaged in discriminatory conduct in the promotion of a less qualified applicant. Subsequently, on December 27, 1996, the Petitioner filed her original Complaint with the United States District Court for the Southern District of Mississippi; this Complaint, filed *pro se*, alleged that

the Respondent had engaged in discriminatory conduct. On April 23, 1997, the Petitioner amended her Complaint to include, among other things, a claim of disparate impact discrimination, by and through the Respondent's use of the Wonderlic test.

The Respondent filed a Motion for Summary Judgment on December 19, 1997. Subsequently, on March 16, 1998, the District Court granted summary judgment. On appeal, the Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court.

A. Disparate Treatment Claim

This case involves claims by the Petitioner of disparate treatment and disparate impact.[1] The Petitioner asserts in her disparate treatment claim

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[1] The Petitioner's claim of disparate impact is based upon the Respondent's use of the Wonderlic standardized test.

that the Respondent's failure to promote was based on race.[2] In addition, the Petitioner asserts that she was more qualified than the applicant ultimately chosen by the Respondent.

In response, the Respondent contends that the Petitioner was not promoted due to her lack of or deficient interpersonal skills.[3] The Respondent also provided inconsistent and conflicting statements as to what qualifications were examined in determining which applicant would be promoted.

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[2] The Petitioner is an African-American female.

[3] When an employer bases its reasoning for failure to promote on the complaining party's lack of or deficient interpersonal skills, such reasoning is subject to heightened scrutiny. *See Bruhwiler v. University of Tennessee*, 859 F.2d 419 (6th Cir. 1988); *Sweeney v. Board of Trustees of Keene State College*, 604 F.2d 106 (1st Cir. 1979).

B. Disparate Impact Claim

The Petitioner asserts that the Respondent's use of the Wonderlic test[4] resulted in an adverse impact on her employment opportunities.[5] Although not specifically mentioned in the Petitioner's Charge of Discrimination filed with the United States Equal Employment Opportunity Commission[6] (also referred to as "EEOC"), the Petitioner asserts that this claim was "reasonably related"[7] to the EEOC Charge, and

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[4] The use of this test was previously determined to be discriminatory. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

[5] The Petitioner further asserts that the Respondent failed to properly validate its use of the Wonderlic test and that the use of such test was improper in that it tainted the applicant pool and applicant flow.

[6] At the time of the filing of the Charge of Discrimination, the Petitioner had been unable to ascertain the assistance of legal counsel.

[7] *See Gomes v. Avco*, 964 F.2d 1330 (2d Cir. 1992).

that an EEOC investigation could reasonably be expected to grow out of the Charge.[8]

The Respondent contends that the Petitioner's disparate impact claim is not sufficiently related to the EEOC Charge and, therefore, an EEOC investigation could not reasonably be expected to grow from such Charge. As such, the Respondent contends that the Petitioner may not bring her disparate impact claim due to the purported failure to exhaust administrative remedies before the EEOC.

C. Proceedings Below

In an Opinion and Order dated March 16, 1998, the District Court granted the Respondent's Motion for Summary Judgment (App., *infra*, 16).

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[8] *See Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970)

Although concluding that the Petitioner had established a prima facie case of discrimination based upon the Respondent's failure to promote, the District Court determined that the Petitioner had failed to submit sufficient evidence to create a reasonable inference that the Respondent's proffered reason for failure to promote was pretextual.[9] The District Court also concluded that it did not possess jurisdiction over the Petitioner's disparate impact claim; this conclusion was based upon the District Court's position that the Petitioner's disparate

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[9] As stated by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), once a plaintiff has established a prima facie case of discrimination, the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for the challenged employment action. If the defendant comes forward with a legitimate reason for the challenged action, the plaintiff must produce evidence sufficient to create a reasonable inference of pretext. *McDonnell Douglas,* 411 U.S. at 803.

impact claim was not "reasonably related" to the EEOC Charge, and was not "reasonably related" to the disparate treatment claim.

Upon appeal to the Court of Appeals for the Fifth Circuit, the Petitioner asserted that the District Court's grant of summary judgment was in error. As to her disparate treatment claim, several reasons were articulated by the Petitioner in support of this assertion. First, the Petitioner pointed out that the District Court failed to subject the Respondent's proffered reasoning for failure to promote to a heightened level of scrutiny.[10] This was so even

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[10] *See Bruhwiler*, 859 F.2d at 420; *Sweeney*, 604 F.2d at 108. In *Bruhwiler*, the Court of Appeals for the Sixth Circuit determined that when an employer bases their reason for failure to promote on the complaining party's lack of or deficient interpersonal skills, such proffered reason is subject to heightened scrutiny. *Bruhwiler*, 859 F.2d at 420. As well, in *Sweeney*, the Court of Appeals for the First Circuit also articulated a heightened level of

though the Respondent's proffered reasoning for failure to promote was based on the Petitioner's purported lack of or deficient interpersonal skills.[11] Second, the Petitioner showed that the Respondent had provided contradictory and inconsistent statements as to what qualifications or considerations were examined in determining which applicant would be selected for the subject promotion.[12] Third, the Petitioner asserted that genuine issues of material fact existed, thus, precluding the granting of

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examination. *Sweeney*, 604 F.2d at 108.

[11] The Respondent claims that the Petitioner possesses deficient leadership and communication skills.

[12] *See Edwards v. United States Postal Serv.*, 909 F.2d 320 (8th Cir. 1990) (holding that inconsistent and contradictory explanations concerning the criteria and basis for failure to promote reveal pretext).

summary judgment.[13]

As to her disparate impact claim, the Petitioner asserted that the District Court erred in its granting of summary judgment in that such claim was "reasonably related" to the allegations contained in the EEOC Charge, and that an EEOC investigation could have been expected to grow out of the EEOC Charge or the response by the Respondent thereto.[14]

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[13] A material fact is considered a "genuine issue" in four instances: 1) diametrically opposed facts or testimony, 2) multiple interpretations of undisputed testimony, 3) where materially differing, but nevertheless reasonable inferences may be drawn from the uncontradicted evidentiary facts, or 4) where the purported establishment of facts has been sufficiently incomplete or inadequate. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

[14] The EEOC is authorized to investigate and pursue other discriminatory practices, though not specifically alleged in the Charge. *See Equal Employment Opportunity Comm'n v. General Elec. Co.*, 532 F.2d 359 (4th Cir. 1976) (holding that if during an EEOC investigation such investigation

The Petitioner also asserted that due to her *pro se* status the EEOC Charge should have been construed in a liberal manner.[15] The Petitioner asserted that the District Court failed to liberally interpret her EEOC Charge to include such disparate impact claim, as well as improperly concluded that the disparate

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uncovers facts which support a charge of another type or additional discrimination, the EEOC may not cast a blind eye); *Joslin Dry Goods Co. v. Equal Employment Opportunity Comm'n*, 483 F.2d 178 (10th Cir. 1973) (upholding the right of the EEOC to investigate an employer's hiring practices, although the subject Charge alleged discriminatory discharge).

[15] *See Lattimore v. Polaroid Corp.*, 99 F.3d 456 (1st Cir. 1996). In *Lattimore*, the Court of Appeals for the First Circuit determined that individuals not represented by counsel at the time of the filing of an EEOC Charge enjoy a more generous standard in determining whether or not the allegations contained in such Charge are sufficiently related to the allegations contained in the subsequent Complaint. *Lattimore*, 99 F.3d at 458. As well, the Court stated that a charging party is not required to set forth with "literal exactitude" all the facts and theories upon which the claim is based. *Id.*

impact claim was not "reasonably related" to the EEOC Charge.

The Court of Appeals for the Fifth Circuit, in its unpublished Opinion dated March 25, 1999 (App., *infra*, 18-22), affirmed the District Court's grant of summary judgment. The Court of Appeals determined that the Petitioner had failed to produce evidence indicating that the Respondent was motivated by discriminatory intent, as to the disparate treatment claim. The Court of Appeals also concluded that the Petitioner's disparate impact claim was not reasonably related to the allegations contained in the subject EEOC Charge.

REASONS FOR GRANTING THE PETITION

At the District Court and Court of Appeals levels, conflicting decisions are proliferating rapidly,

and the need for guidance from this Court is acute. This case is a timely and rare opportunity to provide that guidance. Moreover, the decision below is erroneous, and the issues that it addresses are important.

I. Petitioner's Disparate Impact Claim

The Court of Appeals for the Fifth Circuit determined that the Petitioner's disparate impact claim was not reasonably related to the EEOC Charge due to the Petitioner's failure to mention the Wonderlic test in such Charge (App., *infra*, 20). Thus, the Court of Appeals concluded that the Petitioner had not exhausted administrative remedies and, therefore, the District Court had no jurisdiction to consider the disparate impact claim.

Although the Petitioner concedes that no

mention was made of the Wonderlic test in her EEOC Charge, the Wonderlic test was indeed mentioned by the Respondent in response to such Charge (App., *infra*, 28-30). As indicated by its correspondence to the Petitioner, dated September 5, 1996 (App., *infra*, 28-30), the EEOC, during the course of the subsequent investigation, became aware of the Respondent's use of the Wonderlic test. Had the EEOC properly investigated the Wonderlic issue, it would have determined that the Respondent failed to have readily available a validity study or transportability study.[16] This is aside from the fact that the use of the Wonderlic test has been found to be

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[16] Due to its use of the Wonderlic test, the Respondent was required to have readily available a validity study or transportability study. *See* 29 C.F.R. pt. 1607 § 5(d) (1995).

discriminatory on numerous occasions.[17]

In *Equal Employment Opportunity Comm'n v. General Elec. Co.*, 532 F.2d 359 (4th Cir. 1976), the Court of Appeals for the Fourth Circuit determined that the EEOC, during an investigation, may not cast a blind eye to other discriminatory acts or practices uncovered during such investigation; this case was also cited with approval by this Court in *General Tel. Co. v. Equal Employment Opportunity Comm'n*, 446 U.S. 318 (1980). In *Joslin Dry Goods Co. v. Equal Employment Opportunity Comm'n*, 483 F.2d 178 (10th Cir. 1973), the Court of Appeals for the Tenth Circuit concluded that the EEOC is authorized to investigate other discriminatory practices or conduct, even though not specifically mentioned in the EEOC

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[17] *See Griggs*, 401 U.S. at 435; *see also Watkins v. Scott Paper Co.*, 530 F.2d 1159 (5th Cir. 1976).

Charge.

In the present case, the EEOC should have, at least minimally, investigated the Respondent's use of the Wonderlic test. Even though the EEOC failed to properly investigate the Respondent's use of the Wonderlic test, such inaction on the part of the EEOC should not act as a bar to the Petitioner's disparate impact claim. In *Meser v. Meno*, 130 F.3d 130 (5th Cir. 1997), the Court of the Appeals for the Fifth Circuit determined that additional or supporting documentation submitted to the EEOC acted to expand on allegations contained in an EEOC Charge. Nonetheless, the Court of Appeals for the Fifth Circuit now asserts that the Petitioner's disparate impact claim is not reasonably related to the allegations contained in the subject EEOC Charge since such was not specifically mentioned therein

(App., *infra*, 20, 23-24).

The Petitioner also asserts that due to her *pro se* status at the time of the filing of the EEOC Charge, the Court of Appeals for the Fifth Circuit should have construed the subject Charge in a liberal manner to include her disparate impact claim.[18] However, as stated by the Court of Appeals,

> Smith's EEOC charge did not mention Centra Benefit's use of the Wonderlic test or any other specific employment practice. Rather, her charge simply alleged that Centra Benefit promoted a less experienced white employee. Accordingly, we conclude that Smith's disparate impact claim is not reasonably related to her EEOC charge.

(App., *infra*, 20). In addition, when a charge of discrimination is general or open-ended, claims

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[18] *See Lattimore*, 99 F.3d at 457; *Price v. Southwestern Bell Tel. Co.*, 687 F.2d 74 (5th Cir. 1982).

should be liberally interpreted.[19] Thus, the Court of Appeals failed to interpret the Petitioner's Charge in a liberal manner and failed to expand on the allegations contained therein, in light of the fact that the EEOC possessed knowledge of the Respondent's use of the Wonderlic test.

The constrictive position taken by the Court of Appeals is in conflict with the positions taken by other Circuits. Such a constrictive position serves to circumvent the purpose and principal function of Title VII of the Civil Rights Act of 1964.[20] Therefore, the Petitioner respectfully requests this Court's assistance in resolving this matter.

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[19] *See Babrocky v. Jewel Food Co.*, 773 F.2d 857 (7th Cir. 1985) (holding that charges of a general nature are to be liberally construed, in order to prevent the frustration of the goals of Title VII).

[20] Codified at 42 U.S.C. § 2000e(1)-(17).

II. Petitioner's Disparate Treatment Claim

In affirming the District Court's granting of summary judgment as to the Petitioner's disparate treatment claim, the Court of Appeals for the Fifth Circuit determined that the Petitioner had failed to "point to any evidence indicating that Centra Benefit was motivated by discriminatory intent" (App., *infra*, 22). However, the Petitioner had in fact introduced evidence indicating that the Respondent's proffered reasoning for failure to promote was inconsistent and contradictory.[21] Once evidence was supplied

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[21] In rebutting the Petitioner's prima facie case of discrimination, the Respondent gave both inconsistent and contradictory statements as to what qualifications or considerations were examined in determining which applicant would be selected for the promotion to the Lead position. In response to the EEOC Charge and in a memorandum, dated April 22, 1996, the Respondent stated that the Wonderlic test was used to assist in the selection of the applicant for the subject promotion. As well, the Petitioner contends that management stated that the

that the Respondent's stated reasons for failure to promote were inconsistent and contradictory, pretext should have been presumed.[22]

In *Edwards v. United States Postal Serv.*, the Court of Appeals for the Eighth Circuit determined that the employer's explanation for the challenged action was merely a pretext for discrimination.[23] This determination was based on the employer's inconsistent and changing reasoning for such

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Wonderlic test was in fact used in determining the individual selected for the promotion.

On the other hand, while being deposed, via Fed. R. Civ. P. 30(b)(6), the Respondent stated that the Wonderlic test was not used in the selection of the applicant for the Lead position. In addition, the Petitioner's supervisor provided oral testimony that the Wonderlic test was not taken into consideration in determining which applicant would be promoted.

[22] *See Edwards*, 909 F.2d at 324.

[23] *Id.*

action.[24]

In the present case, based on the Respondent's inconsistent and contradictory statements, pretext should have been presumed. Nonetheless, the Court of Appeals determined that the Petitioner had not provided evidence indicating that the Respondent was motivated by discriminatory intent. This position is in direct contradiction to *Edwards*.[25]

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[24] The employer first stated that the plaintiff was not transferred to the subject position due to her work performance needing improvement, and because she had not been employed for a full year. *Id.* at 322. Next, while at an EEOC hearing, the employer stated that the plaintiff was an excellent employee and was qualified for the subject position. *Id.* However, the employer could not recall why it had earlier claimed the plaintiff had performed her work in a poor manner. Finally, during a deposition, the employer again gave a contradictory and internally inconsistent explanation for its decision. *Id.* at 324.

[25] 909 F.2d at 320.

The Respondent also contends that the Petitioner was not promoted due to her lack of or deficient interpersonal skills (App., *infra*, 33-35). In particular, the Respondent claimed that the Petitioner did not possess strong communication and leadership skills.

Once an employer bases their reason for failure to promote on the complaining party's lack of or deficient interpersonal skills, such proffered reason is subject to a heightened scrutiny examination.[26] However, as evidenced by its Opinion (App., *infra*, 18-22), the Court of Appeals wholly failed to examine the Respondent's proffered reasoning with heightened scrutiny; this failure on the part of the Court of Appeals does not comport

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[26] *See Bruhwiler*, 859 F.2d at 420; *Sweeney*, 604 F.2d 107.

with the decisions rendered by other Circuits.[27] Thus, the Court of Appeals failed to properly examine the Respondent's reason for failure to promote.

CONCLUSION

The decision rendered by the Court of Appeals for the Fifth Circuit is erroneous in that the Respondent's disparate impact claim is indeed "reasonably related" to the subject EEOC Charge. Due to the fact that the EEOC should have investigated the Respondent's use of the Wonderlic test, as well as the fact that the Petitioner was unrepresented by counsel at the time of the filing of the EEOC Charge, the Petitioner's disparate impact

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[27] *See Bruhwiler*, 859 F.2d at 419; *Sweeney*, 604 F.2d at 106.

claim should have been contained within her EEOC Charge.

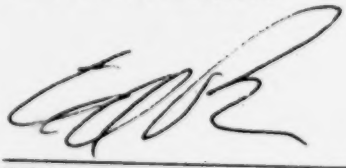
As to the Petitioner's disparate treatment claim, the Court of Appeals also erroneously affirmed the District Court's grant of summary judgment. Based on the Respondent's inconsistent and contradictory explanation for failure to promote, the Court of Appeals should have determined that such proffered explanation or reason was merely a pretext. In addition, once the Respondent articulated a reason based on lack of or deficient interpersonal skills, the Court of Appeals should have examined the Respondent's proffered reason with heightened scrutiny.

The decision rendered by the Court of Appeals is in conflict with the various decisions rendered by other Circuits. As well, the issues presented for

review by this Court are important to both the present Petitioner and other similarly situated individuals. Therefore, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ALICE M. SMITH

BY: 

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ALICE M. SMITH

V.

CENTRA BENEFIT SERVICES, INC.

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PETITIONER'S APPENDIX

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304

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION
No. 3:96CV929BN

ALICE M. SMITH,
Plaintiff,

v.

CENTRA BENEFIT SERVICES, INC.,
Defendant.

OPINION AND ORDER

This cause is before the Court on the Motion for Summary Judgment filed by Defendant CENTRA Benefit Services, Inc. ("CENTRA"). Having considered the Motion, Response, Rebuttal, all attachments to each, and supporting and opposing memoranda, the Court finds that the Motion is well taken and should be granted.

I. Factual Background and Procedural History

In this case brought under Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e, et seq., Plaintiff Alice Smith ("Smith"), a black female, alleges that Defendant discriminated against her on the basis of her race. Plaintiff was and still is employed as a Claims Examiner in the Medical Review Department at CENTRA.

Plaintiff began working as a Claims Examiner at CENTRA on March 20, 1995. In September, 1995, Peggy Seale, Operations Manager for CENTRA, appointed Plaintiff to the position of Temporary Unit Leader of the Medical Review Department. In October, 1995, CENTRA posted the opening for the permanent Unit

Leader position on the company bulletin board. Plaintiff applied for this position, as did several other employees. CENTRA subsequently removed the bulletin board announcement. A short time later, the announcement was placed on the bulletin board again. Janice Broocks ("Broocks"), another CENTRA employee, submitted an application for the Unit Leader position. Seale conducted interviews with all of the applicants produced by the two postings.

The job duties of the Unit Leader involve coordinating work flow, problem solving and assigning work to others in the unit. The Unit Leader Job Description states that the minimum education, experience and certification requirements are:

> A high school diploma or equivalent is required and additional training beyond high school in medical terminology or in a related field required. Three years experience in claims processing is required.

Exhibit "7" to Exhibit "3" of Defendant's Statement of Undisputed Facts. Under "Knowledge, Skills, and Abilities" the Unit Leader Job Description states:

> Knowledge of calculation of benefits, enrollment procedures, refund suspense, and utilization review processes. Knowledge of CPT, ICD and UB, and ADA coding. Knowledge of the complete claims paying process. Skills in problem solving, customer service, claims processing, insurance contract interpretation, and interpersonal skills. Ability to read and understand insurance contracts, codes used in claims paying, computer screens, instructions from clients, letters and memos. Ability to calculate benefit payments to determine accuracy of deductibles and coinsurance. Ability to perform basic mathematical calculations. Ability to write responses to appeals, correspondence, refund requests, and information requests. Ability to operate a telephone, calculator, PC, CRT, and

copier. [sic].

Id. The Unit Leader Job Description does not require any kind of medical degree or nursing degree. Id.

Broocks had eight and one-half year's related experience in claims processing and one and one-half year's experience in a Lead position in another department at CENTRA. After interviewing Broocks, Seale noted on Broocks Applicant Log Sheet, that Broocks had "excellent communication skills" and "good organizational skills". Seale also noted that Broocks was "committed and works hard" and that Broocks had a "get the job done attitude".

Plaintiff had nine and one-half year's related experience in claims processing. Plaintiff also possessed a Licensed Practical Nurse degree and medical knowledge. Plaintiff's management experience was limited to the three months she served as temporary Unit Leader at CENTRA and a short period when she was assigned a similar temporary fill-in leadership position at a previous employer. After interviewing Plaintiff, Seale noted on Plaintiff's Applicant Log Sheet "communication skills weak" and that Plaintiff "does not demonstrate recognition of needs of the unit." Seale also noted "self sell", "limited (very) lead or supervisory experience" and "committed and works hard."

In January, 1996, CENTRA management announced that Broocks had been selected as Unit Leader. On January 17, 1996, Plaintiff initiated step one of CENTRA's grievance process and procedure by writing a letter to Seale complaining that she was more qualified that Broocks and that she should have been awarded the Unit Leader position. Plaintiff also stated that she felt CENTRA had discriminated against her because of her race. Subsequently, Plaintiff wrote letters to Larry Waggoner and John Voltmer, upper level managers at CENTRA, with the same complaint. Seale, Waggoner and Voltmer responded to Plaintiff's letters, explaining CENTRA's hiring procedures and concluding that CENTRA had not discriminated against Plaintiff because of her race. Voltmer's letter to Plaintiff stated that Voltmer had reviewed Plaintiff's claim by reviewing the internal job posting applications, resumes, interview notes, the original job applications, Wonderlic test results and

performance evaluations for the applicants. The letter also states "CENTRA's hiring guidelines of applicants (Including friends and relatives of employees) are determined by minimum qualifications, previous experience, interview results, test results, and information provided on the job application". The letter then concluded that CENTRA guidelines were followed, and CENTRA had not discriminated against Plaintiff because of her race.

Plaintiff was not satisfied with CENTRA's responses to her grievances. On March 15, 1996, she sent a letter to the EEOC explaining that she was denied a promotion and the she believed she was denied the promotion because of her race. On March 22, 1996, Plaintiff filed a complaint with the Equal Opportunity Commission ("EEOC"). In her EEOC complaint, she stated that she had applied for the lead position in medical review, that a less experienced white employee was selected and that she believed she was denied the promotion because of her race. Plaintiff also submitted a completed Charge Questionnaire to the EEOC in which she stated that "A job that I was qualified for was given to a lessor qualified white female." On this Charge Questionnaire, in response to the question, "What reason(s) did the employer give for taking this action against you?" Plaintiff responded, "The reason was that the other person was more qualified." Plaintiff did not mention the Wonderlic test in either her letter to the EEOC, her EEOC complaint or her Charge Questionnaire.

On September 25, 1996, the EEOC mailed Plaintiff her "right to sue" letter. On December 27, 1996, Plaintiff filed a pro se Complaint against CENTRA. In her Complaint, Plaintiff alleged that CENTRA racially discriminated against her because a lessor qualified white applicant was given a job for which she was more qualified. Plaintiff did not allege that CENTRA's use of the Wonderlic test had a disparate impact upon applicants based on their race.

Plaintiff retained an attorney, and on April 23, 1997, Plaintiff filed an Amended Complaint. The Amended Complaint stated that CENTRA was liable to Plaintiff under Title VII for compensatory and punitive damages for intentionally discriminating against Plaintiff because of her race and, additionally, that CENTRA

violated Title VII in its use of the Wonderlic test, which, Plaintiff alleged, had a disparate impact on black applicants.

II. Positions of the Parties

CENTRA asserts that Plaintiff's Complaint is time barred in that it was not filed within the ninety-day period following receipt of her right to sue letter as required under Title VII.

CENTRA also argues that Plaintiff's disparate impact claim regarding the Wonderlic[1] test should be dismissed because Plaintiff failed to exhaust all of her administrative remedies with regard ti this claim. The disparate impact claim was not mentioned in Plaintiff's EEOC charge. For this reason, Plaintiff argues this Court lacks jurisdiction to hear the claim.

CENTRA also argues that the disparate impact claim was not set forth in Plaintiff's Complaint and does not relate back to any allegations set forth in the Complaint. CENTRA argues that the disparate impact claim is thus time-barred.

In the alternative, CENTRA argues that Plaintiff's disparate impact claim is without merit because the Wonderlic test was not utilized by CENTRA in making the determination of whether Plaintiff or Broocks should have been awarded the Unit Leader position. CENTRA also argues that the undisputed facts show no evidence of disparate impact based upon the Wonderlic test.

CENTRA argues that Plaintiff's claim for punitive or compensatory damages should be dismissed because Plaintiff has not established a prima facie case of intentional race discrimination under Title VII. CENTRA argues that Plaintiff was not as qualified for the promotion to Unit Leader. CENTRA claims that even if the Plaintiff has established a prima facie case under Title VII, Plaintiff has not set forth facts proving that CENTRA acted with discriminatory intent in denying Plaintiff that promotion to Unit Leader. For this reason, CENTRA argues that Plaintiff's disparate

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[1]A Wonderlic test is a standardized pre-employment test which purportedly is designed to address basic problem-solving skills.

treatment claim should be dismissed.

Finally, CENTRA argues that because Plaintiff has not established that she has suffered any medical injury as a result of the alleged discrimination, Plaintiff is not entitled to any compensatory damages.

Plaintiff argues that Plaintiff did file her Complaint in a timely fashion because under the Federal Rules of Civil Procedure, three days must be added to the date the EEOC mailed the right to sue letter, and Plaintiff filed her Complaint within 93 days after the EEOC mailed the right to sue letter. Plaintiff contends that even though Plaintiff did not include the disparate impact claim in her EEOC complaint, the disparate impact is reasonable related and intertwined with her claim of disparate treatment. Thus, Plaintiff argues that the Court does have jurisdiction over the disparate impact claim. Plaintiff also argues that the disparate impact claim relates back to the claim of intentional discrimination raised in her original Complaint. Finally, Plaintiff argues that she has established a prima facie claim of disparate impact.

Plaintiff also argues that she has established a prima facie case of intentional discrimination under Title VII. Plaintiff argues that she was more qualified that Broocks because she has a Licensed Practical Nurse ("LPN") degree and Broocks did not. Plaintiff alleges that Broocks and Peggy Seale were close friends. Plaintiff contends that she did not receive the promotion to Unit Leader because of her race.

III. Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure state in relevant part that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The United States Supreme Court has held that this language "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make sufficient

showing to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Cattrett, 477 U.S. 317, 322, (1986); see also Moore v. Mississippi Valley State Univ., 871 F.2d 545, 549 (5th Cir. 1989); Washington v. Armstrong World Indus., 839 F.2d 1121, 1122 (5th Cir. 1988).

The party moving for summary judgment bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record in the case which it believes demonstrate the absence of a genuine material fact. Celotex, 477 U.S. at 323. The movant need not, however, support the motion with materials that negate the opponent's claim. Id. As to issues on which the non-moving party has the burden of proof at trial, the moving party need only point to portions of the record that demonstrate an absence of evidence to support the non-moving party's claim. Id. at 323-324. The non-moving party must then go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." Id. at 324.

Summary judgment can be granted only if everything in the record demonstrates that no genuine issue of material fact exists. The district court, therefore, must not "resolve factual disputes by weighing conflicting evidence, ... since it is the province of the jury to assess the probative value of the evidence." Kennett-Murray Corp. v. Bone, 622 F.2d 887, 892 (5th Cir. 1980). Summary judgment is improper where the court merely believes it unlikely that the non-moving party will prevail at trial. National Screen Serv. Corp. v. Poster Exchange, Inc., 305 F.2d 647, 651 (5th Cir. 1962).

IV. Analysis

A. Timeliness of Plaintiff's Complaint

Rule 6 of the Federal Rules of Civil Procedure provides that whenever a party is required to do some act within a prescribed period after the service of a notice and the notice is served upon the party by mail, 3 days shall be added to the prescribed period. The Court finds that the Plaintiff filed her Complaint within 93 days after

the EEOC mailed her right to sue letter, and Plaintiff's Complaint was timely filed.

B. Disparate Impact Claim

Under Title VII, parties are required to exhaust administrative remedies before instituting suit in federal court. National Association of Government Employees, et al. v. City Public Services Board of San Antonio, Texas, 40 F.3d 698, 711 (5th Cir. 1994) (cited in Denman V. Mississippi Power & Light Co., 906 F. Supp. 379, 382 (S.D.Miss. 1995)). A plaintiff must file a discrimination charge with the EEOC and receive a right to sue letter before a plaintiff may bring a civil lawsuit under Title VII. 42 U.S.C. § 2000e-5(f)(1). The plaintiff's filing a charge with the EEOC allows the EEOC to engage in an investigatory and conciliatory function designed to solve the problem before lawsuits are under taken. McNamara v. City of Chicago, 867 F. Supp. 739, 748 (N.D.Ill. 1994).

In order for a federal court to have jurisdiction over claims in a civil complaint filed under Title VII, the complaint must encompass "discrimination like or related to allegations contained in the [EEOC] charge and growing out of such allegation during the pendency of the case before the Commission." National Ass'n of Gov't Employees v. City Pub. Serv. Bod. Of San Antonio, 40 F.3d 698, 711 (5th Cir. 1994); Sanchez v. Standard Brands, Inc., 431 F.2d 455, 466 (5th Cir. 1970). Since the purpose of filing a charge with the EEOC is to allow the EEOC to investigate Title VII claims, in determining whether claims in the complaint are "reasonably related" to the claims set forth in the EEOC charge, the Court must inquire what scope of EEOC investigation could reasonably be expected to grow from the original EEOC complaint. National Ass'n of Gov't Employees, 40 F.3d at 712; Schnelbaecher v. Baskin Clothing Co., 887 F.2d 124, 127 (7th Cir. 1994).

Courts in other jurisdictions examining whether disparate impact claims are "reasonably related" to disparate treatment claims asserted in EEOC charges have scrutinized information provided by the plaintiff in the EEOC charge. The courts analyze whether the

information provided would alert the EEOC to investigate and inquire about the practice allegedly causing the disparate impact. See Noreuil v. Peabody Coal Co., 96 F.3d 254, 258 (7th Cir. 1996) (court dismissed disparate impact claims where claim was factually unrelated to retaliation claim set forth in EEOC charge such that administrative agency investigating retaliation claim would almost certainly have failed to inquire into theory of disparate impact); Van Jelgerhuis v. Mercury Finance Co., 940 F.Supp. 1344, 1354 (S.D.Ind. 1996) (where claims of sex harassment listed in EEOC charge did not reasonably implicate employment practices resulting in disparate impact, claim for disparate impact raised in complaint was dismissed).

For a disparate impact claim to be reasonable related to a disparate treatment claim, the impact claim must be specifically factually related to and intertwined with the treatment claim. See Leisen v. City of Shelbyville, 968 F. Supp. 409, 421-22 (S.D.Ind. 1997) (where plaintiff's EEOC charges, which alleged disparate treatment and retaliation, made no reference to claim of disparate impact and did not include any factual allegations which might relate in any way to disparate impact claim, mere fact that allegations of disparate treatment related to sex discrimination was not enough to bring disparate impact claim of sex discrimination within scope of EEOC charge); Spurlock v. NYNEX, 949 F. Supp. 1022, 1029 (W.D.N.Y. 1996) (dismissing disparate impact claim on ground that it was unrelated to his EEOC charge alleging workplace harassment); Beth v. Espy, 854 F. Supp. 735, 738 (D.Kan. 1994) (denying plaintiff's motion to amend complaint to add claim of disparate impact, since plaintiff's EEOC charge of disparate treatment failed to mention the supervisory experience requirement which formed the basis of her disparate impact claim).

In Gomes v. Avco. 964 F.2d 1330 (2nd Cir. 1992), the Court of Appeals for the Second Circuit held that a disparate impact claim was reasonably related to a disparate treatment claim. In that case, the plaintiff set forth in his EEOC charge a claim of intentional discrimination based on his Portuguese descent. In the EEOC charge, the plaintiff alleged that his employer had denied him a promotion based upon an eight year experience rule that he claimed he had

satisfied. The EEOC sent plaintiff a right to sue letter, and he filed a complaint against the employer. The plaintiff's complaint included a claim of disparate treatment and added a claim of disparate impact.

The Court held that, although the claim for disparate impact was not expressly state din the EEOC charge, the disparate impact claims was so related to the claim of disparate treatment that the court had jurisdiction over the claim. Gomes, 964 F.2d at 1335. The Court noted that the EEOC charge had discussed the eight year experience rule as part of the disparate treatment claim, and "it would have been perfectly natural for the EEOC to question the necessity of the eight year rule itself." Id. at 1334. Applying the EEOC investigation test, the court held that an investigation of the disparate impact claim would reasonably have flowed from an investigation of his disparate impact claim. Id. at 1334-35

The court's holdings in Gomes was distinguished in a case factually similar to this case. In McKinney v. Eastman Kodak Co., 975 F. Supp. 462, (W.D.N.Y. 1997), the plaintiff alleged in an EEOC charge that her employer was liable for disparate treatment and retaliation based upon her age. After receiving her right to sue letter, the plaintiff filed a complaint against her employer under Title VII for age discrimination and retaliation. The plaintiff subsequently filed a motion under Rule 15 of the Federal Rules of Civil Procedure to amend her complaint to add several other causes of action against her employer, including a disparate impact claim, alleging that the employer's reliance on performance evaluations had a disparate impact on older employees. The defendant argued that the court had no jurisdiction over the claim for disparate impact because the disparate impact claim was not included in plaintiff's EEOC charge. The plaintiff cited Gomes as support for her argument that the disparate treatment claim would have alerted the EEOC to investigate whether the employer was committing practices that had a disparate impact on employees based upon their age.

The court held that Gomes was factually distinguishable. McKinney, 975 F. Supp. At 467. The court noted that in Gomes, although the allegations in Plaintiff's EEOC complaint did not expressly assert a disparate impact theory, the allegations suggested that plaintiff was denied a promotion because of a rule (the eight year

experience rule) that, on its face, appeared to be nondiscriminatory but which would have had a disparate impact on Portuguese employees. In plaintiff's case, however, the EEOC charge alleged that plaintiff was discharged in retaliation for complaining about employment discrimination, but the EEOC charge made no mention of the process by which the employer decided which employees to terminate. The court stated that the EEOC would not naturally have investigated the procedure by which the plaintiff was terminated. Id. at 467.

> This is simply too far a stretch. To adopt plaintiff's position would allow virtually every disparate treatment claim to encompass a disparate impact claim as well.

Id. For this reason, the court dismissed the plaintiff's claim of disparate impact. Id.

In the present case, although Plaintiff was aware that CENTRA used the Wonderlic test results in determination of promotion of its employees, Plaintiff made no mention of the use of the Wonderlic test in her EEOC charge. Plaintiff alleged that a lessor qualified white candidate had received a position for which she was qualified. Unlike the EEOC charge in Gomes, the EEOC charge Plaintiff filed did not mention any specific CENTRA employment practice. Since Plaintiff's EEOC charge alleged only that CENTRA discriminated specifically against her by choosing a lessor qualified white candidate for the position of Unit Leader, there is no reason that the EEOC would investigate whether CENTRA's use of the Wonderlic test adversely affected all of the black employees at CENTRA.

The Court agrees with the court's analysis in McKinney that to adopt this position would allow virtually every disparate treatment claim to encompass a disparate impact claim as well. Plaintiff's claim of disparate impact is not reasonably related to her claim of disparate treatment. Since Plaintiff did not assert her claim of disparate impact in her EEOC charge, the Court has no jurisdiction over the disparate impact, and this claim must be dismissed as a

matter of law.[2]

C. Disparate Treatment Claim

In order for Plaintiff to establish a prima facie case for discrimination based upon her claim that she was denied the promotion to Unit Leader because of her race, she must establish that (1) she is a member of a protected class; (2) she sought and was qualified for the position; (3) she was rejected for the position; and (4) the employer continued to seek applicants for the position with the same qualifications as Plaintiff. See LaPierre v. Benson Nissan, Inc., 86 F.3d 444, 448 (5th Cir. 1996) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

Plaintiff asserts that it is undisputed that Plaintiff was qualified for the position of Unit Leader. However, the exhibits which Plaintiff claims support this assertion do not necessarily establish this fact. See Plaintiff's Memorandum in Support of Response, at 7. CENTRA argues that it is undisputed that Plaintiff was not as qualified as Broocks for the Unit Leader position. CENTRA claims that since Plaintiff and Broocks did not have the same or similar qualifications, plaintiff's prima facie case fails on the forth prong.

The Court finds that there is a genuine issue of material fact with disregard to whether Plaintiff and Broocks were "similarly qualified" for the position of Unit Leader. The Court also finds that after receiving Plaintiff's application for the Unit Leader job, CENTRA continued to seek applicants for the Unit Leader position with qualifications similar to those of Plaintiff. For these reasons, the Court will assume for the purposes of the instant Motion that Plaintiff has established a prima facie case. Since the Plaintiff has established a prima facie case of discrimination, the Court must

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[2] Since the Court has determined that it has no jurisdiction over Plaintiff's disparate impact claim and that Plaintiff's disparate impact claim must be dismissed, the Court will not address Defendant's claim that the disparate impact claim is time-barred, and the Court will not address the merits of the disparate impact claim.

evaluate CENTRA's actions.

> Once established, the plaintiff's prima facie case raises an inference of intentional discrimination. ... The burden of production then shifts to the defendant to articulate a legitimate, non-discriminatory reason for the challenged employment action. ... If the defendant comes forward with a reason which, if believed, would support a finding that the challenged action was nondiscriminatory, the inference raised by the plaintiff's prima facie case drops from the case. ... The focus then shifts to the ultimate question of whether the defendant intentionally discriminated against the plaintiff.

LaPierre. 86 F.3d at 448.

CENTRA asserts that the reason Broocks was hired as Unit Leader instead of Plaintiff is that Broocks was better qualified for the Unit Leader position than was Plaintiff. Seale was seeking to fill the Unit Leader position with someone with a strong ability to perform in a leadership role. Broocks had performed in a similar leadership position for CENTRA for one and one-half years. Plaintiff had less leadership experience, and, according to Seale's interview notes, Plaintiff's communication skills were weak. The only evidence Plaintiff proffered in favor of her argument that she was more qualified than Broocks is her own subjective belief that she was more qualified. The Court finds that because CENTRA sought the candidate with the best leadership skills to fill the position of Unit Leader, CENTRA had legitimate reason for hiring Broocks instead of Plaintiff.

The Court concludes that CENTRA has satisfied its burden of production by offering legitimate reason which, if believed, supports a finding that the decision to hire Broocks instead of Plaintiff was nondiscriminatory. Thus, the burden which shifted to the Defendant under the McDonnell Douglas analysis has been met, and "the inference of unlawful discrimination created by [Plaintiff's]

prima facie evidence disappears." LaPierre, 86 F.3d at 448.

The Court now must determine whether any genuine issues of material fact exist concerning whether CENTRA's failure to promote Plaintiff to Unit Leader was based upon Plaintiff's race. The Fifth Circuit has recently refined this final inquiry concerning whether a plaintiff has produced enough evidence to survive a judgment as a matter of law.

> Direct evidence of an employer's discriminatory intent is rare; therefore, Title VII plaintiffs must ordinarily prove their claims through circumstantial evidence. A plaintiff may establish circumstantial evidence of intentional discrimination by demonstrating that a defendant's articulated non-discriminatory rationale was pretextual. ...In fact, "[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." ...
>
> In Rhodes v. Guiberson Oil Tools, we considered en banc whether a plaintiff necessarily presents a jury issue on the ultimate question of intentional discrimination by proving the elements of a prima facie case and presenting a fact issue as to the truth of the defendant's proffered rationale. We held that "the answer lies in our traditional sufficiency-of-the-evidence analysis." ... Our traditional sufficiency-of-the-evidence standard provides, "There must be a conflict in substantial evidence to create a jury question." ... In the employment discrimination context, evidence is "substantial" if it is "such as to allow a rational

> factfinder to make a reasonable inference that age[3] was a determinative reason for the employment decision." ... Accordingly, we announced the following standard: "[A] jury issue will be presented and a plaintiff can avoid summary judgment ... if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and (2) creates a reasonable inference that age was a determinative factor in the actions of which plaintiff complains.

LaPierre, 86 F.3d at 449-450 (quoting extensively from Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 993-94 (5th Cir. 1996) (en banc)); additional citations omitted).

Applying the first part of the Rhodes test to the facts of this case, the Court finds that Plaintiff has failed to submit any evidence that the stated reason for CENTRA's denial of her promotion to Unit Leader pretextual. Plaintiff has offered no evidence that Broocks was not qualified for the position of Unit Leader or that Broocks does not have adequate leadership skills. Plaintiff argues that because she holds an LPN degree and Broocks does not, she is more qualified than Broocks. However, an LPN degree was not listed as a job requirement under the Unit Leader job description posted by CENTRA and was not considered necessary by CENTRA management. Plaintiff's own subjective belief that her LPN degree made her more qualified than Broocks does not overcome the fact that an LPN was not required for the position. The Court finds that the evidence is not sufficient to create a genuine issue of material fact concerning Plaintiff's discrimination claims.

Applying the second part of the Rhodes test, the Court finds that Plaintiff has failed to produce any evidence which would create a reasonable inference that the loss of her promotion was motivated

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[3] Although discrimination based upon age was the question in Rhodes, the analysis applies equally to other types of discrimination.

by any discriminatory intent. Plaintiff has identified no statements or other actions on the part of anyone at CENTRA indicating that CENTRA's decision not to promote her to Unit Leader was based upon her race. Because no genuine issues of material fact exist concerning this issue, the Defendant is entitled to judgment as a matter of law.

IV. Conclusion

The Court finds that with regard to her claim of disparate impact, the Plaintiff failed to exhaust her administrative remedies. Thus, the Court has no jurisdiction to consider the merits of Plaintiff's disparate impact claim. With regard to Plaintiff's discrimination claim, the Court finds that the Plaintiff has failed to create a genuine issue of material fact sufficient to survive the Defendant's Motion for Summary Judgment.

IT IS THEREFORE ORDERED that the Defendant's Motion for Summary Judgment should be and hereby is granted.

A Final Judgment consistent with this Opinion and Order will be entered on this date.

SO ORDERED this the 16th day of March, 1998.

/s/ William H. Barbour, Jr.
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION
No. 3:96CV929BN

ALICE M. SMITH,
Plaintiff,

v.

CENTRA BENEFIT SERVICES, INC.,
Defendant.

FINAL JUDGMENT

In accordance with the Opinion and Order entered on this date in the above styled and numbered cause of action, the claims of the Plaintiff against the Defendant are hereby dismissed with prejudice, and Final Judgment is hereby rendered in favor of the Defendant.

SO ORDERED this the 16th day of March, 1998.

/s/ William H. Barbour, Jr.
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-60165

ALICE M. SMITH
Plaintiff - Appellant

VERSUS

CENTRA BENEFIT SERVICES, INC.
Defendant - Appellee.

Appeal from the United States District Court
For the Southern District of Mississippi
(3:96-CV-929-B-N)

Before DAVIS, DUHE, and PARKER, Circuit Judges Per Curiam[1]:

Alice Smith ("Smith") sued her employer, Centra Benefit Services ("Centra Benefit"), for violating her rights under Title VII. She appeals the district court's grant of summary judgment for Centra Benefit. For the following reasons, we affirm.

Background

In 1995, Smith served as the temporary Unit Leader in Centra Benefit's medical Review Department. Smith, a black female, was one of three applicants for the permanent Unit Leader position. After interviewing the applicants, Centra Benefit selected Janice Broocks ("Broocks"), a white female, as Unit Leader.

Smith filed a complaint with the Equal Employment

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[1]Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Opportunity Commission ("EEOC"), alleging that Centra Benefit promoted a less qualified white employee. Further, she alleged that she was denied the promotion because of her race. After the EEOC mailed Smith a "right to sue" letter, she filed a pro se complaint against Centra benefit. In her complaint, she alleged that Centra Benefit discriminated against her by giving the promotion to a less qualified white employee. Subsequently, Smith retained an attorney and amended her complaint to also allege that Centra benefit's use of the Wonderlic test had a disparate impact on black applicants for the Unit Leader position.[2]

Centra Benefit moved for summary judgment. The district court granted Centra benefit's motion. Smith appeals.

Discussion

We review the grant of summary judgment de novo, using the same criteria used by the district court. See Walker v. Sears, Roebuck & Co., 853 F.2d 355, 358 (5th Cir. 1988).

I. Disparate Impact Claim

"It is well-settled that courts have no jurisdiction to consider Title VII claims as to which the aggrieved party has not exhausted administrative remedies." National Association of Government Employees v. City Public Service Board of San Antonio, Texas, 40 F.3d 698, 711 (5th Cir. 1994). "[T]he 'scope' of the judicial complaint is limited to the 'scope' of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." Sanchez v. Standard Brands, Inc., 431 F.2d 455, 466 (5th Cir. 1970).

Smith's disparate impact claim asserted in her amended complaint alleged that Centra Benefit's use of the Wonderlic test has an adverse impact on black applicants for the Unit Leader position. However, her EEOC charge did not mention Centra Benefit's use of the Wonderlic test. Rather, her EEOC charge alleged that she (1) was

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[2]The Wonderlic test is a problem-solving test.

not adequately compensated for serving as a temporary Unit Leader and (2) did not receive the promotion to the permanent position because of her race. Reasoning that her disparate impact claim was not reasonably related to her EEOC charge, the district court concluded that it lacked jurisdiction over Smith's disparate impact claim.

Smith maintains that the district court erred by granting summary judgment for Centra Benefit. She contends that her disparate impact claim is reasonably related to her EEOC complaint because the EEOC learned about Centra Benefit's use of the Wonderlic test during the course of its investigation. Noting that several cases found the Wonderlic test has a discriminatory impact, Smith argues that the EEOC should have investigated Centra Benefit's use of the test. See Watkins v. Scott Paper Co., 530 F.2d 1159, 1185 (5th Cir. 1976) (stating that the Wonderlic test "has been shown to be discriminatory in impact in a number of ... Title VII cases.").

We disagree. A disparate impact claim "involve[s] employment practices that are facially neutral in their treatment of different groups but in fact fall more harshly on one group than another and cannot be justified by business necessity." International Brotherhood of Teamsters v. United States, 97 S.Ct. 1843, 1854 n.15 (1977). Smith's EEOC charge did not mention Centra Benefit's use of the Wonderlic test or any other specific employment practice. Rather, her charge simply alleged that Centra Benefit promoted a less experienced white employee. Accordingly, we conclude that Smith's disparate impact claim is not reasonably related to her EEOC charge. See Noreuil v. Peabody Coal Co., 96 F.3d 254, 258-59 (7th Cir. 1996) (holding that the plaintiff's disparate impact claim was not reasonably related to the retaliation claim set forth in her EEOC charge because the charge failed to allege that the defendant's policies were discriminatory).[3]

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[3]In Gomes v. Avco. Co., 964 F.2d 1330, 1334-35 (2nd Cir. 1992), the Second Circuit held that the plaintiff's disparate impact claim was reasonably related to the disparate treatment claim alleged in his EEOC charge. Gomes is factually distinguishable from the case at bar. In

II Disparate Treatment Claim

To establish a prima facie discrimination case, a plaintiff must show that: (1) she is a member of a protected class; (2) she sought and was qualified for an available employment position; (3) she was rejected for that position; and (4) the employer continued to seek applicants with the plaintiff's qualifications. See LaPierre v. Benson Nissan, Inc., 86 F.3d 444, 448 (5th Cir. 1996). "Once established, the plaintiff's prima facie case raises an inference of intentional discrimination. The burden of production then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the challenged employment action." Id.

If the defendant meets its burden, the presumption of discrimination disappears. See Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 993 (5th Cir. 1996) (en banc). "However, the plaintiff is accorded the opportunity to demonstrate that the defendant's articulated rationale was merely a pretext for discrimination." Id. A plaintiff can avoid summary judgment by (1) creating a fact issue as to whether the defendant's stated reason is what actually motivated the defendant and (2) creating a reasonable inference that the plaintiff's race was a determinative factor in the adverse employment action. See id. at 994.

For purposes of the summary judgment motion, the district court assumed that Smith established a prima facie discrimination case. The district court concluded that Centra Benefit's proffered reason for promoting Broocks instead of Smith – that Broocks had better leadership skills and experience – satisfied Centra Benefits

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Gomes, the plaintiff maintained that the defendant's eight year experience requirement had a disproportionate impact on persons of Portuguese descent. Although the plaintiff's EEOC charge did not allege disparate impact, it mentioned the eight year experience requirement. Noting that the plaintiff brought the eight year requirement to the EEOC's attention, the Second Circuit reasoned that the EEOC could have reasonable inquired as to whether the requirement had a discriminatory impact. In contract, Smith's EEOC charge did not mention Centra Benefit's use of the Wonderlic test.

burden of production. Therefore, the presumption of discrimination disappeared and Smith was given an opportunity to show that the proffered reason was a pretext for discrimination. The district court concluded that Smith failed to produce any evidence that Centra Benefit's proffered reason for promoting Broocks instead of Smith was pretextual and failed to produce evidence indicating that Centra benefit was motivated by discriminatory intent.

Smith contends that the district erred by granting summary judgment for Centra Benefit on her disparate treatment claim because of disputed issues of material fact. She maintains that issues of fact exist as to (1) whether she was more qualified than Broocks and (2) whether Centra benefit used the Wonderlic test in making its decision. We disagree. Smith's brief fails to point to any evidence indicating that Centra Benefit was motivated by discriminatory intent. Therefore, the district court properly granted summary judgment for Centra Benefit.

Conclusion

We affirm the summary judgment in favor of Centra benefit.
AFFIRMED.

APPENDIX D

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.

Agency : EEOC
Charge Number : 131-96-0812

Name: Ms. Alice M. Smith
Home Telephone: (601) 982-4927
Street Address: 5726 Brownlee Drive, Jackson, MS 39206
Date of Birth: 08/21/53

Named is the Employer, Labor Organization, Employment Agency Apprenticeship Committee, State or Local Government Agency who discriminated against me.

Name: Centra Benefits Service
Number of Employees, members: Cat A (15-100)
Telephone: (601) 933-1300
Street Address: 1080 River Oaks Drive, Pearl, MS 39208
County: 121
Cause of Discrimination Based on: Race
Date Discrimination Took Place: 01/11/96

The particulars are:

> I was hired by the above employer in march 1995 as a medical review specialist. My supervisor resigned and I worked in the lead position from September 10, 1996 without being paid wages commensurate with the additional duties and responsibilities. I applied for the position and on January 11, 1996, learned that a less experienced white employee was selected.

The manager and the director told me that the more qualified candidate was selected for the position.

I believe that I was denied financial compensation for serving as temporary lead and denied the promotion because of my race, black, in violation of Title VII of the Civil Rights Act of 1964, as amended, since:

The manager of the medical review department temporarily filled the vacant director slot from June 1995 to August 1995 and was financially compensated.

I declare under the penalty of perjury that the foregoing is true and correct.

/s/ Alice M. Smith
Charging Party

Date: 3-22-96

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION
No. 3:96CV929BN

ALICE M. SMITH,
Plaintiff,

v.

CENTRA BENEFIT SERVICES, INC.,
Defendant.

COMPLAINT

COMES NOW plaintiff, Alice M. Smith, pro se, and for cause of action against the defendant, Centra Benefit Services, would state:

JURISDICTION

I.

It is my belief that Centra Benefit Services has racially discriminated against me because a lessor qualified white applicant was given a job that I more qualified for.

II.

Plaintiff is an adult resident citizen of the County of Hinds, State of Mississippi. The defendant, Centra Benefit Services, is a Third party Administrator that processes the health insurance claims for the State of Mississippi and is located in the County of Rankin, State of Mississippi.

FACTS

I was employed by Centra Benefit Services on March 20, 1995 as a Medical Review Specialist/Claims Examiner in the Medical Review Department. I had the longest tenure in the department and I was very knowledgeable in my work at Centra as an LPN. I was highly recommended for the position of Lead by my former manager, Jane Street, and former supervisor, Denise Stacks, prior to their resignations. While serving temporarily in this capacity for three and one half months, I worked long hours and I was told on numerous occasions that I was doing a good job by Mr. Larry Waggoner, Director. I worked hard to obtain this position on a permanent basis which would have been a promotion for me but when the permanent position was assigned, it was given to a lessor qualified white applicant.

RELIEF

I am entitled to financial compensation for my work while in the lead capacity, punitive damages from the stress, embarrassment and medical problems I have been subjected to as a result of this unfair decision.

Respectfully submitted this the 24th day of December, 1996.

/s/ Alice M. Smith
(Signature of plaintiff)

Name, address and phone no. of plaintiff:

Alice M. Smith
5726 Brownlee Drive
Jackson, Mississippi 39206
(601) 982-4927

APPENDIX F

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Birmingham District
Jackson Area office
207 West Amite Street
Jackson, Mississippi 39201
Ph: (601) 965-4537
TDD: (601) 965-4915
Fax: (601) 965-5272

September 5, 1996

Ms. Alice M. Smith
5726 Brownlee Drive
Jackson, MS 39206

Re: Charge No. 131-96-0812
Alice M. Smith vs. Centra Benefit Services, Inc.

Dear Ms. Smith:

This letter is to inform you of the Respondent's (Centra Benefit Services, Inc.) position statement regarding your charge of discrimination, which was filed with this office on march 22, 1996. The comments made in this letter should not be interpreted as being fully accepted by this office at this time.

However, according to Respondent's position, it denies you were denied financial compensation for serving as temporary Lead person from September 27, 1995 to January 10, 1996 and denied promotion as Unit Leader on or about January 11, 1996, because of your race (Black); but states instead, "your salary at the time of the temporary assignment as Unit Leader was $24,250.00, which is 20 percent plus, over the minimum of the salary range (Minimum, $20,184 X 20 percent = $24,200.00). It was determined Janice Broocks was the most qualified for the Unit Leader position".

More specifically, the Respondent states:

"Ms. Alice Smith was hired on March 20, 1995, as a Claim Examiner. Denise Stacks, Medical Review Specialist, resigned effectively, September 29, 1995. On September 29, 1995, Peggy Seale, Operations manager, asked Alice Smith to be the Acting Lead for the Medical Review Unit until a decision could be made on possible changes in the organization structure of the unit and the leadership of that unit.

Alice Smith temporary assignment was from October 1, 1995 until January 12, 1996 (15 weeks). During this time period Alice was in claims examiner training class 6 hours a day for five weeks. During this five weeks period, the unit functioned with limited access to the Unit Leader. Alice Smith's salary at that time of the temporary assignment was $24,250.00.

During the temporary assignment, Alice Smith was paid an additional $200, on her November 11, 1995 pay check, as were other Unit Leaders, for meeting pre-set production goals for each unit for a specified period."

Alice M. Smith
September 5, 1996
Page 2

According to the record, "the percentage of a salary increase given should be determined by results of performance appraisal, location of current salary range and comparison of other employees in the same job title to his/her performance and salary location of range".

The record shows, you and two other employees, Janice Broocks and Michelle Vinchwater applied for the Unit Leader position.

Evidence show the following documents were used to assist in determining qualifications of the three applicants that applied for the Unit Leader position:

- Hire date and work history at CENTRA.
- Wonderlic Test (a problem solving test) results which is given to each applicant at the time of hire.
- Interview notes, internal job posting application, resume, CENTRA Employment application, current and previous Manager's documentation of performance evaluations and periodic communications with employees.
- The ob description of the Unit Leader position was reviewed to ensure the minimum qualifications were met by the applicants for this position.

The record show Janice Broocks, a white employee and current Unit Leader for the Retiree Unit, was offered the transfer to the Medical Review Unit as Unit Leader. It was determined that Janice Broocks was the most qualified for the Unit Leader position.

Just to note a few comparisons, from my reviewing records in the three applicants personnel files, I noted:

HIRE DATE/CENTRA HISTORY/WONDERLIC TEST SCORE

Janice Brooks was hired June 13, 1994 as a Claims Examiner; was promoted August 29, 1994 to Unit Leader. Wonderlic Test Score - 25.

Alice Smith was hired March 20, 1995 as a Claims Examiner. Wonderlic Test Score - 18.

Michelle Vinchwater was hired May 3, 1995 as a Claims Examiner. Wonderlic Test Score - 26.

Although the Unit Leader position you sought would have been a promotion for both you and Michelle Vinchwater, Respondent made a decision (within their rights), to transfer successful applicant, Janice Broocks, into the position, since she was promoted to Unit Leader, August 29, 1994.

Alice M. Smith
September 5, 1996
Page 3

While the Commission continues to investigate the allegations in your charge of discrimination, we wish to make you aware no decision or finding has been made to date, based on the foregoing information. If you fail to provide information to the contrary, our determination could result in a no-cause finding being issued in this matter.

To discuss your charge in further detail or offer any rebuttal to any statement the Respondent has conveyed to the Commission, you should contact me immediately. I can be reached at (601) 965-5614 between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday.

As always, your cooperation is necessary as well as expected. If we don not hear from you be September 16, 1996, your charge may be processed for dismissal due to your failure to cooperate with this investigation, in accordance with our procedural regulations.

On behalf of the Commission,

/s/ Ernestene W. Owens
Enforcement Investigator

EWO:ewo

CHARGING PARTY COPY

APPENDIX G

CENTRA Benefit Services Memorandum

April 22, 1996

To: All Employees
From: Larry Waggoner
Re: Job Posting Program

We believe that the success of each of you individually is a critical component to the overall success of CENTRA.. Company standards and goals can never replace your personal desire to achieve certain objectives in your career development.

Our current job posting program is designed to accomplish the following:

1) Assist CENTRA in filling vacancies with experienced, qualified, capable individuals.
2) Offer opportunities for those who have mastered their present positions and are looking for further career growth.
3) recognize employees who have performed well in their present positions, maintaining a consistent track record for performance, attendance, initiative and teamwork.

A variety of factors are considered very carefully when reviewing internal candidates for positions, just as with external candidates. Each position may require different criteria, depending upon the duties and responsibilities of the job.

Primary factors considered in selecting candidates include:

→ Meeting minimum requirements of position (length of service, minimum number of years experience, etc, as indicated on the job description).

- → Overall experience in the duties of the position (job knowledge).
- → Possessing necessary skills required for the particular position.
- → Performance/attendance track records.
- → Applicable education.
- → Test scores.

Other factors considered are:

- → Proven ability to assume additional responsibility and assignments.
- → Adaptability, cooperation, and being a team player.
- → Previous contributions to the success of employee's unit/department/CENTRA.
- → Ability to interact effectively with staff at all levels (interpersonal/communication skills/professionalism).

Page 2
April 18, 1996

Employment applications, resumes, test scores and interview results are carefully evaluated in making hiring decisions. Input is also received from the employee's present manager/lead and the most recent performance review is evaluated.

Simply by the law of "supply and demand", we must choose only the most qualified individual for any particular position, weighing all the factors mentioned previously. You can prepare for the next opportunity by continually developing your skills, knowledge, and ability. If you are not selected for a position, examine your strengths and weaknesses, looking for ways to capitalize upon your strengths and address your weaknesses. Discuss your career goals with your manager or lead and they will be glad to assist you in identifying current training needs, suggesting ideas for improving weaknesses, etc., and in assisting you in formulating a logical, progressive career development plan.

APPENDIX H

Centra Benefit Services

May 21, 1996

Via Certified Mail # Z 370 615 366

Ms. Alice M. Smith
5726 Brownlee Drive
Jackson, Mississippi 39206

Dear Ms. Smith:

I have spent considerable time reviewing the situation you describe in your April 25, 2996 letter and attachments to me. This has included discussions with Dan Maier, Larry Waggoner, and Cathy Hargenrader. It is my understanding you correctly followed the internal process for "Resolution of Work-Related Concerns or Issues," as recommended to you in John Voltmer's memos of August 9, 1995, and October 25, 1995. That prompter investigations to be conducted regarding your concern about racial discrimination in CENTRA's hiring and promotion practices. The conclusion of that investigation and multi-level management review determined that concerns you expressed were unfounded, and resulted in response provided to you be Peggy Seale, manager, Larry Waggoner, Director of Operations, Jackson, and John Voltmer, President and Chief Operating Officer. According to the policy associated with the above stated process, the final decision of the process rest with the Vice President of President of CENTRA. Therefore, the internal process has been followed and final resolution has been reached and communicated to you in the letter from John G. Voltmer dated March 5, 1996. A copy of that letter is attached for your convenience.

Given the foregoing, including all my discussions, I too find no basis to the allegation that CENTRA has a hiring and promotion problem

predicated on racial discrimination as your letters state. I know through my working association with CENTRA senior management that all of us take it very seriously when an employee expresses a racial discrimination hiring or promotion concern. CENTRA Benefit Services, Inc. is an equal opportunity employer and will not knowingly tolerate discrimination against any applicant for employment or any employees with regard to promotion, compensation, benefits or transfers, due to race, creed, color, age, sex, national origin, or disability.

CENTRA's hiring and promotion guidelines are determined by minimum qualifications, previous experience, interview results, test results and information provided on the job application to ensure the most qualified candidate is chosen for the position. In reading your letters and discussing them with Jackson management, I believe the main difference in opinion between yourself and Jackson management centers on the qualifications for the unit leader position for which you applied. Much of this difference is derived from the changing role of the Medical Review function from it primarily being internal, to having it primarily be an outsourced function through auspices of Pro West.

Ms. Alice M. Smith
Page 2
May 21, 1996

The conclusion I have drawn from reading the Performance Appraisal and discussions with management is that you were, and still are, performing at a satisfactory level as a claims examiner. In fact, comments were made that you have exhibited a professional demeanor, appearance, and maintained productivity throughout the past few months that you have been pursing your work-related concerns. However, during the period you were performing in the temporary capacity of unit leader, certain deficiencies were evident as noted in the Performance Appraisal, and I understand were communicated to you during various discussions. These deal with the fundamental objectives and requirements of the unit leader position.

Specifically, a key skill is the ability to accomplish the unit's objectives through others under the unit leader's direction. This effective delegation and management were lacking during your tenure as temporary unit leader. In addition, expectations by both Jackson management and the client regarding the backlog reduction and customer service interface of the Medical Review team were not being met.

In summary, I believe this is a case of your performance being very acceptable as a claims examiner, but that you are not yet prepared for the additional responsibilities of unit leader as the qualifications for the position in question focus more on leading and managing than they do on medical knowledge and terminology familiarity. These are skills which you will need to develop to be qualified to move to a lead position should there be another opening in the future.

Sincerely,

/s/ Jon K. Lineweaver
Chief Executive Officer

JKL:jew

Attachment

Supreme Court, U.S.
FILED
SEP
CLERK

No. 99-202

IN THE

Supreme Court of the United States

ALICE M. SMITH,

Petitioner,

v.

CENTRA BENEFIT SERVICES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, CENTRA Benefit Services, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
Statement Pursuant to Rule 29.6	i
Table of Contents	ii
Table of Cited Authorities	iii
Statement of the Case	1
Statement of Facts	2
Reasons for Denying the Writ	3
I. The Writ Should Be Denied Inasmuch As The Fifth Circuit's Decision Does Not Give Rise To A Conflict Among Circuits.	3
II. The Court Of Appeals Properly Affirmed The District Court's Grant Of Summary Judgment As To Petitioner's Disparate Impact Claim For Lack Of Jurisdiction, Due To Petitioner's Failure To Exhaust Administrative Remedies And The Lack Of A Reasonable Relation To Her Disparate Treatment Claim.	5
III. The Fifth Circuit Correctly Held That Petitioner's Disparate Treatment Claim Failed Because Petitioner Failed To Produce Any Evidence Indicating That Respondent Was Motivated By Discriminatory Intent.	8
Conclusion	10

TABLE OF CITED AUTHORITIES

	Page
Cases:	
Anderson v. Douglas & Lomosan Co., 26 F.3d 1277 (5th Cir. 1994)	6
Edwards v. United States Postal Serv., 909 F.2d 320 (8th Cir. 1990)	5
Fellows v. Universal Restaurants, Inc., 701 F.2d 447 (5th Cir. 1983)	6
Grimes v. Texas Dept. of Mental Health, 102 F.3d 137 (5th Cir. 1996)	7, 9
Joslin Dry Goods Co. v. Equal Employment Opportunity Comm'n, 483 F.2d 178 (10th Cir. 1973)	4
Lattimore v. Polaroid Corp., 99 F.3d 456 (1st Cir. 1996)	4
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1972)	8
Nat'l Ass'n of Gov't Employees v. Pub. Serv. Bd. of San Antonio, 40 F.3d 698 (5th Cir. 1994)	6
Price v. Southwestern Bell Tel. Co., 687 F.2d 74 (5th Cir. 1982)	4
Wards Cove Packaging Co. v. Antonio, 490 U.S. 642, 109 S. Ct. 2115 (1989)	7

Cited Authorities

Page

Statute:

42 U.S.C. § 2000(e) *et seq.* 1

Rule:

SUP. CT. R. 10 4

STATEMENT OF THE CASE

Petitioner Alice Smith (hereinafter "petitioner" or "Smith") filed this action in the United States District Court for the Southern District of Mississippi, claiming that CENTRA Benefit Services, Inc. (hereinafter "respondent" or "CENTRA") failed to promote her to the position of unit leader because of her race in violation of Title VII of the Civil Rights Act of 1964.[1]

CENTRA ultimately filed its Motion for Summary Judgment, asserting that Smith's claims should be dismissed because: (1) Smith's disparate impact claim regarding the use and administration of the Wonderlic test was not raised in the EEOC Charge she filed prior to commencing this action[2], and therefore the District Court lacked jurisdiction over the claim; and (2) Smith could not establish a claim of disparate treatment regarding her denial of promotion.

The District Court granted CENTRA's Motion for Summary Judgment, dismissing Smith's action in its entirety, based upon: (1) the court's lack of jurisdiction for Smith's failure to exhaust administrative remedies; and (2) Smith's failure to put forth any evidence of CENTRA's discriminatory intent. The United States Court of Appeals for the Fifth Circuit subsequently affirmed the District Court's grant of summary judgment in favor of CENTRA.[3]

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1. Codified at 42 U.S.C. § 2000(e) *et seq.*

2. Petitioner admits that she failed to mention the disparate impact claim in her EEOC Charge of Discrimination. *See* Pet. 13-14.

3. For the complete opinion of the United States Court of Appeals for the Fifth Circuit, *see* Appendix C to Petition, pp. 18-22.

As set forth below, there is no basis for this Court's review of the petitioner's contentions, which have now been disposed of by summary judgment in the District Court and affirmed by the United States Court of Appeals for the Fifth Circuit. Despite the petitioner's allegation that the Fifth Circuit's opinion "is in conflict with the various decisions rendered by other Circuits,"[4] the petitioner fails to establish any clear conflict between the Fifth Circuit's decision and those decisions of other circuits.

STATEMENT OF FACTS

Since petitioner has mischaracterized the facts in the petition, the Court should be made aware of other significant facts which must be considered. Petitioner is a black female who was employed by CENTRA. In October, 1995, Peggy Seale, Operations Manager for CENTRA, made petitioner the temporary unit leader in the Medical Review Department when the prior lead left the company. Petitioner was one of three applicants for the permanent lead position, along with Janice Broocks and Michelle Vinchwater, who are both white. Ms. Seale interviewed all three of the internal candidates for the unit leader position. In January, 1996, Ms. Seale selected Ms. Broocks for the position based on Ms. Broocks' superior leadership skills and experience.[5]

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4. Pet. 24.

5. Specifically, Ms. Broocks' qualifications for the lead position included 1½ years in a lead position in another department at CENTRA. Further, during the interviewing process, Ms. Seale found Ms. Broocks to have excellent communication and good organizational skills. On the other hand, Smith's management experience was limited to the three months Smith served as (Cont'd)

On March 22, 1996, Smith filed her charge with the Equal Employment Opportunity Commission (hereinafter "EEOC") claiming that she believed she was denied the promotion because of her race.[6] Smith did not mention the Wonderlic test in any of the documents that she submitted to the EEOC. On September 25, 1996, the EEOC mailed petitioner a "Right to Sue" letter. On December 27, 1996, petitioner filed a complaint with the District Court setting forth a single claim of racial discrimination.[7] Petitioner subsequently filed an Amended Complaint on April 23, 1997, which included a new claim alleging that CENTRA's use and administration of the Wonderlic test had a disparate impact on black applicants.

REASONS FOR DENYING THE WRIT

I.

THE WRIT SHOULD BE DENIED INASMUCH AS THE FIFTH CIRCUIT'S DECISION DOES NOT GIVE RISE TO A CONFLICT AMONG CIRCUITS.

The Rules of this Court specifically state the criteria that the Court considers when deciding which cases are to come

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(Cont'd)

temporary lead for CENTRA and a short time in a similar fill-in position she held on a temporary basis at a previous employer. Also, Ms. Seale found Smith's performance as temporary lead to be less than adequate, and also found her communication skills weak during her interview.

6. *See* Appendix D to Petition, pp. 23-24.

7. There was also no mention of the Wonderlic test in the Complaint.

before it for review. The first consideration, on which the petitioner relies, is that "a United States Court of Appeal has entered a decision in conflict with the decision of another United States Court of Appeal on the same important matter." SUP. CT. R. 10. Despite the petitioner's allegation that the Fifth Circuit's opinion conflicts with those decisions rendered by other circuits, the petitioner fails to establish any clear conflict between the Fifth Circuit's decision and those decisions of other circuits regarding the two matters that are in issue.

As to her disparate impact claim, petitioner cites decisions from other circuits that supposedly would liberally construe petitioner's attempt at exhausting her administrative remedies. *See Lattimore v. Polaroid Corp.*, 99 F.3d 456 (1st Cir. 1996); *Price v. Southwestern Bell Tel. Co.*, 687 F.2d 74 (5th Cir. 1982); *Joslin Dry Goods Co. v. Equal Employment Opportunity Comm'n*, 483 F.2d 178 (10th Cir. 1973). However, in the present case, the Fifth Circuit Court of Appeals did not reject these decisions. Rather, the Fifth Circuit correctly held that petitioner failed to seek *any* administrative remedy from the EEOC regarding the alleged disparate impact of an employment practice of CENTRA. It is well settled law among all Courts of Appeals that a court has no jurisdiction to consider a Title VII claim where the plaintiff has failed to exhaust administrative remedies. Therefore, no conflict among circuits exists on this particular matter.

The petitioner also cites to ***one*** Eighth Circuit decision in support of her disparate treatment claim that is allegedly "in conflict" with the Fifth Circuit's decision below. Once again, petitioner fails to establish a conflict here, as the case

is easily distinguishable on its facts.[8] This single Eighth Circuit decision, when compared with the Fifth Circuit's decision in this case, does not register as a conflict among the circuits worthy of the Supreme Court's review.

II.

THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT AS TO PETITIONER'S DISPARATE IMPACT CLAIM FOR LACK OF JURISDICTION, DUE TO PETITIONER'S FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES AND THE LACK OF A REASONABLE RELATION TO HER DISPARATE TREATMENT CLAIM.

A plaintiff must file a discrimination charge with the EEOC and receive a right to sue letter before bringing a civil

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8. Petitioner solely cites *Edwards v. United States Postal Serv.*, 909 F.2d 320 (8th Cir. 1990). In *Edwards*, the Eighth Circuit Court of Appeals did not require the plaintiff to put forth evidence of her employer's discriminatory intent, as was true in this case. Instead, the court presumed pretext due to the employer's extreme actions in overlooking plaintiff for a promotion. For example, after the three top male candidates for a clerk position expressed that they were not interested in the position, the Postmaster skipped over the female plaintiff, who was fourth in priority, and instead chose a male part-time employee with no prior clerking experience. Further, during administrative investigations and EEOC hearings, the Postmaster testified both that plaintiff was "an excellent employee" and that she was "denied . . . the clerk position because her work performance needed improvement." *Edwards*, 909 F.2d at 322. These extreme facts render *Edwards* and the case at bar distinguishable; therefore *Edwards* does not apply in this situation and these decisions do not conflict on this matter.

lawsuit under Title VII, and "[i]t is well settled that courts have no jurisdiction to consider Title VII claims as to which the aggrieved party has not exhausted administrative remedies." *Nat'l Ass'n of Gov't Employees v. Pub. Serv. Bd. of San Antonio*, 40 F.3d 698, 711 (5th Cir. 1994). The scope of the judicial complaint is generally limited to the scope of the EEOC investigation. *Fellows v. Universal Restaurants, Inc.*, 701 F.2d 447, 450 (5th Cir. 1983). The petitioner "concedes that no mention was made of the Wonderlic test in her EEOC Charge." (Pet. 13-14).[9] Petitioner's failure to assert this claim in her EEOC charge precludes her from proceeding on her Wonderlic claim before the Court.

Not only is petitioner's Wonderlic claim absent from the EEOC charge, it is also not even remotely related to her disparate treatment claim. For the Court to have a basis for jurisdiction, the allegations in the Complaint must at a minimum encompass allegations "reasonably related" to those contained in the EEOC charge. *Nat'l Ass'n of Gov't Employees*, 40 F.3d at 711. The distinct nature of the two claims petitioner has alleged in her Amended Complaint is amply demonstrated by the differing elements required to establish them and the defense required of respondent.[10]

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9. Petitioner's claim that respondent's use of the Wonderlic test has a disparate impact appears for the first time in her Amended Complaint. Neither petitioner's EEOC charge nor any other communications by her to the EEOC make any reference to the Wonderlic test.

10. Proving a Wonderlic claim involves the production and review of statistical evidence regarding the impact of the use of Wonderlic for promotions. *Anderson v. Douglas & Lomosan Co.*, 26 F.3d 1277, 1282 (5th Cir. 1994). Once a plaintiff makes this *prima*

(Cont'd)

These distinctly different evidentiary considerations demonstrate the equally different nature of petitioner's promotion claim and her Wonderlic claim.

Further, in considering whether claims are reasonably related, the Court must consider what scope of EEOC investigation could reasonably be expected to grow from the EEOC charge. The focus of this inquiry is on the information provided by the plaintiff, not the logic followed by the EEOC in responding to the charge. Petitioner states that the EEOC "became aware of respondent's use of the Wonderlic test,"[11] and claims that the EEOC did not properly investigate the issue. Yet, at no time did petitioner ever ask the EEOC to do so. Petitioner's EEOC charge gives no notice of a disparate impact claim regarding the Wonderlic test which would alert the EEOC to investigate and inquire about this practice.

In sum, the Fifth Circuit Court of Appeals correctly held that there was no jurisdiction to hear petitioner's disparate impact claim since it was not reasonably related to the disparate treatment claim, and therefore petitioner failed to exhaust administrative remedies regarding the disparate treatment claim. In so holding, the Fifth Circuit correctly

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(Cont'd)
facie case, the defendant must defend the practice by showing that it is reasonably justified by legitimate business purposes. *Wards Cove Packaging Co. v. Antonio*, 490 U.S. 642, 659, 109 S. Ct. 2115, 2126 (1989). In contrast, petitioner's disparate treatment claim involves a focus on the specific qualifications of plaintiff regarding the position she sought vis a vis the qualifications of other applicants. *Grimes v. Texas Dept. of Mental Health*, 102 F.3d 137, 143 (5th Cir. 1996).

11. Pet. 14.

applied properly stated rules of law, and therefore this decision is not in conflict with other circuits.

III.

THE FIFTH CIRCUIT CORRECTLY HELD THAT PETITIONER'S DISPARATE TREATMENT CLAIM FAILED BECAUSE PETITIONER FAILED TO PRODUCE ANY EVIDENCE INDICATING THAT RESPONDENT WAS MOTIVATED BY DISCRIMINATORY INTENT.

As for her disparate treatment claim, petitioner was first required to establish a *prima facie* case of disparate treatment.[12] The District Court first found that Summary Judgment was not appropriate as to the plaintiff's *prima facie* case.[13] Pursuant to the controlling *McDonnell Douglas* burden-shifting framework, the burden of production then shifted to respondent to articulate a legitimate, nondiscriminatory reason for the challenged employment action. *McDonnell Douglas Corp.*, 411 U.S. at 882. The undisputed facts demonstrate that CENTRA based its

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12. A *prima facie* showing requires that petitioner demonstrate that: (1) she belongs to a protected group; (2) she was qualified for, and applied for, a promotion; (3) she was considered for and denied the promotion; and (4) other employees of similar qualifications not members of the protected group were promoted at the time her request was denied. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1972).

13. However, in so finding, the District Court gave petitioner the benefit of the doubt and inferred a genuine issue of material fact with regard to whether petitioner and Broocks were similarly qualified.

decision to select Ms. Broocks on the basis of her superior leadership skills and experience,[14] which dropped the inference of intentional discrimination raised by petitioner's *prima facie* showing from the case. At this point, the petitioner maintained the ultimate burden of presenting proof of respondent's discriminatory intent. *Grimes v. Texas Dept. of Mental Health*, 102 F.3d 137, 143 (5th Cir. 1996). However, petitioner has failed to produce any evidence whatsoever of intentional discrimination by respondent.

Further, petitioner could identify no statements or other actions on the part of anyone at CENTRA that indicated discrimination. Absent direct evidence of discrimination, petitioner must offer evidence which would allow a rational fact finder to make a reasonable inference that race was a determinative reason for the decision to promote Ms. Broocks instead of her. *Grimes*, 102 F.3d at 143. No such evidence exists in this case. Seale's decisions were based solely on Broocks' qualifications relative to petitioner's and her assessment of petitioner's performance as temporary lead. The Fifth Circuit correctly held that petitioner failed to produce evidence indicating discriminatory intent on the part of CENTRA. In affirming the District Court, the Fifth Circuit properly applied the relevant rules of law, and therefore no conflict among the circuits exists on this issue.

---

14. CENTRA selected Ms. Broocks for the Unit Lead because Peggy Seale, the manager responsible for the hiring decision, sought the person with the strongest ability to perform the leadership role inherent in the lead position. For more specific information regarding Broocks' qualifications relative to petitioner's, *see supra* footnote 5 and accompanying text.

CONCLUSION

The petition for writ of certiorari should be denied inasmuch as the decision rendered by the Court of Appeals for the Fifth Circuit does not stand in conflict with any decision rendered by any other Court of Appeals. The Fifth Circuit properly held that it had no jurisdiction to hear petitioner's disparate impact claim since she failed to exhaust administrative remedies prior to filing suit under Title VII. This is well-settled law, and the Fifth Circuit's decision on this matter does not stand in conflict with any other circuit's decision. Further, the Court of Appeals correctly held that petitioner failed to put forth any evidence of discriminatory intent. Petitioner only cites one case allegedly in conflict with the Fifth Circuit's decision, but this case is easily distinguishable, and these decisions certainly do not establish a conflict worthy of this Court's review.

The petition fails to establish any clear conflict between the circuits on the same important matter as was decided by the Fifth Circuit below. The Fifth Circuit correctly applied properly stated rules of law in reaching their decision, and therefore this case does not justify the Supreme Court's review. Simply put, this petition raises no issues that warrant review, and therefore should be denied.

Respectfully submitted,

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